(3)

No. 89-1622

IN THE

Supreme Court of the United States

October Term, 1989

ODEH JOSEPH SALEH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Numerous statements of fact made by the prosecution in its brief in opposition to the Petition for Certiorari are inaccurate. These misstatements have a direct bearing on the question of what issues would properly be before the Court if certiorari were granted. In Rule 15.1 of the new Rules of the Supreme Court of the United States, this Honorable Court admonishes counsel that they have a duty to bring perceived misstatements in the briefs to the attention of this Honorable Court in a timely manner. Petitioner thus submits his Reply Brief for consideration by this Honorable Court.

Issue 1: Trial Counsel for Petitioner *Did* Object to the Jury Instructions on the Gun Charge.

The prosecutor's brief in opposition states (see Brief in Opposition at p. 4, numbered paragraph 1) that Petitioner's trial counsel did not object to the jury instructions on the gun charge at trial. As shown by the trial transcript pages included in the appendix attached hereto, counsel for Petitioner *did* object to the judge's instruction to the jury regarding the gun charge. Petitioner's trial counsel stated:

> "There is no instruction as to possession. It's like it's—in drug cases, if you don't give an instruction as to possession, it's plain error. I submit to this Court the way that instruction is given, it's isolated, and it would be plain error in view of the fact that there's no specific instruction as to possession on the gun possession." (Transcript Vol. 8, p. 189, lines 19-25).

The transcript thus shows that Petitioner's trial counsel specifically objected to the judge's instruction to the jury, and that the trial judge overruled the objection.

It is Petitioner's position that the jury instructions and/or lack of jury instructions impermissably and seriously confused the jury with regard to the essential elements of possession and proof needed to convict under 18 U.S.C. Section 922(g) "Felon in Possession of a Firearm."

Issue 2: The Prosecution's Brief in Opposition Has Argued Evidence Which Was Not Admitted at Trial and Which Raises Improper Inferences.

The prosecution's brief in opposition states that bullets were found in the Petitioner's pocket at the time of his arrest (See Brief in Opp., p. 7). However, the trial transcript reveals that no such bullets were introduced at trial as evidence. These alleged items would most certainly have been introduced into evidence if they had actually been found. The prosecution must not be allowed to manufacture "evidence" at the appellate level. The trial transcript shows that the only bullets admitted into evidence on this charge were the bullets found inside Petitioner's brother's pistol.

A brief summary of the facts actually before the trial court shows that (1) the gun at issue was owned by and legally registered to Petitioner's brother, (2) Petitioner's brother kept the gun at his place of employment, a store which was co-owned by Petitioner's brother, Petitioner, and a third person, (3) Petitioner did not actually possess the gun, did not indicate any intent to possess the gun, and made no attempt to possess the gun on the date charged, and (4) no fingerprints of Petitioner were found on the gun.

Thus, the prosecution's statement that bullets were found in the Petitioner's pocket is an attempt to create damaging multiple inferences, *i.e.*, if Petitioner possessed bullets, then the bullets must have been for his brother's gun, and that Petitioner therefore must have intended to exert control over the gun. However, since the trial transcript shows that no bullets allegedly found on Petitioner were admitted into evidence, these inferences are not proper. Moreover, the bullets referred to in the prosecution's brief are not identified in any way.

Petitioner has been convicted of "constructively" possessing his brother's legally registered gun. This gun was found at the business where Petitioner's brother worked full-time and where Petitioner worked on Fridays. A DEA agent testified that the Petitioner was busy helping a female patron with her groceries at the time of his arrest, and that this sale was a legitimate one for groceries (See Tr., Jan. 10, 1989, Vol. 6, p. 25, lines 3-20).

Thus, Petitioner has been convicted on the basis of his presence in the store where he was lawfully employed. There is no proof of intent by Petitioner to possess the gun on the date charged. There is merely an inference which is based on Petitioner's presence in the store. "Mere" presence, however, is an insufficient basis upon which to convict for constructive possession of a gun. *United States v. Beverly*, 750 F.2d 34 (6th Cir. 1984); *United States v. Reese*, 775 F.2d 1066 (9th Cir. 1985).

The implications of upholding Petitioner's conviction for the gun charge must be carefully considered. If the requisite "intent" for gun possession can be inferred from mere presence and/or proximity, this essentially means that an individual could be forbidden from entering his place of employment or home if a co-owner decides to keep a gun on the premises. Implicit in the analysis of inferred intent for constructive possession is the further question of whether Petitioner has the right to force another co-owner to remove a lawful gun from the store premises. This would require Petitioner to control the lawful actions of another person.

An additional source of confusion regarding the gun charge is the fact that, as a "conspiracy" trial, this trial included extensive evidence that the Petitioner's *brother*

had been previously arrested while possessing another gun. This other gun was admitted into evidence although it was unrelated to the charge against Petitioner. The evidence of Petitioner's brother's gun possession and improper inferences therefrom undoubtedly influenced the finding of guilty regarding Petitioner.

For the foregoing reasons as well as the reasons contained in the Petition for Certiorari, it is Petitioner's respectful position that the prosecution's evidence against the Petitioner for the charge under 18 U.S.C. Section 922(g) is legally insufficient for a proper conviction, and that this Honorable Court should disregard the prosecution's statement regarding bullets, as no such bullets were actually submitted as evidence at trial.

Issue 3: Whether the Evidence Actually Shows That Petitioner Was "Intimately Involved" with Aiding and Abetting an Attempt to Distribute Cocaine.

The prosecution's brief in opposition states that Petitioner was "intimately involved" in the December 4, 1987 attempted drug transaction which is the basis for the charge of aiding and abetting against Petitioner. However, there is no direct evidence linking Petitioner with this transaction. The issue before the Court is whether the evidence is sufficient to uphold the conviction on this particular charge.

For its evidence of "intimate involvement," the prosecution relied exclusively on several phone calls which relate to an earlier transaction which was abandoned. Specifically, on November 19, 1987, DEA Agent Braccio called Petitioner's brother "Tony" and tried to set up a deal to buy narcotics. The agent did not speak with Petitioner. The next morning Agent Braccio called the store when Petitioner was working. Petitioner answered the phone and cautioned Agent Braccio that Petitioner's brother had "security," *i.e.*, carried a gun. No narcotics or other criminal activity were discussed with Petitioner.

On the same day (November 20, 1987), the proposed transaction with Petitioner's brother "Tony" was abandoned, and no deal transpired. DEA Agent Braccio himself testified that "we told him [Tony] either the deal was going to go at that location or it wasn't going to go at all, and then Tony refused to do the deal . . ." (Tr. January 5, 1989, p. 24, lines 15-17). Agent Braccio states that "the deal did not go through" (Tr. January 5, 1989, p. 24, lines 18-19).

When Agent Braccio tried to buy narcotics from Tony two weeks later, he contacted *only* "Tony," Petitioner's brother. There was no contact whatsoever with Petitioner. Tony made no references to Petitioner and there is no evidence that he consulted with Petitioner about this sale for any reason.

In fact, there is no evidence that Petitioner participated in or even knew about the December 4, 1987 transaction which was negotiated and entirely conducted by his brother and another unrelated person, Joseph Slate. Even if one could infer knowledge from an earlier phone call, knowledge alone is an insufficient basis upon which to convict a man for aiding and abetting. Petitioner must have been a participant, rather than a spectator. See *United States v. Morei*, 127 F.2d 827 (6th Cir., 1949); *United States v. Forl*, 518 F.2d 1134, 1137 (6th Cir. 1975); *United States v. Gallo*, 763 F.2d 1504, 1521 (6th Cir. 1985).

Furthermore, Gary Raymond, the prosecution's own witness and an admitted drug addict, testified that Petitioner's brother conducted deals without Petitioner's knowledge or participation (See Tr. Jan. 4, 1989, p. 74, lines 1-11). Case Agent Braccio also testified that Petitioner's brother had warned him to stay away from Petitioner (See Tr. Vol. 4, Jan. 6, 1989, p. 28, lines 10-12, and p. 30, lines 18-22). This testimony, coupled with the lack of direct evidence against Petitioner, certainly raises reasonable doubt as to whether Petitioner even knew about the deal which Petitioner's brother attempted on December 4, 1987.

Furthermore, this evidence must realistically be reviewed against the known fact that Petitioner's brother had a drug problem (Tr. Jan. 11, 1989, p. 97, lines 19-22).

Petitioner's brother apparently sold drugs to finance his habit. Petitioner cannot be responsible for each and every independent act of this brother.

Petitioner asserts that the evidence did not prove the prosecution's allegations beyond a reasonable doubt. When one considers that thirty years of a man's life are at stake, a careful review of the evidence is certainly warranted, especially given the lack of direct and circumstantial evidence on this particular charge.

The trial court should have granted Petitioner's Motion for Acquittal on Count 18, as raised in Petitioner's appeal, since the evidence is insufficient to support a finding that Petitioner aided and abetted an attempt to distribute narcotics on December 4, 1987, pursuant to 21 U.S.C. §841(a)(1), 21 U.S.C. §846, and 18 U.S.C. §2.

CONCLUSION

Numerous statements made by the prosecution in its brief in opposition are inaccurate and directly affect determinative issues in this appeal. First, the trial transcript shows that counsel for Petitioner *did* object to the judge's instructions to the jury regarding the charge of gun possession. See Appendix for transcript pages.

Second, the prosecution's brief in opposition argues that bullets were found in the Petitioner's pocket at the time of his arrest. However, no such bullets were introduced at trial as evidence.

Third, the prosecution's brief in opposition argues that Petitioner was "intimately involved" in a particular transaction, when there is actually no direct evidence of any participation by Petitioner. For the foregoing reasons and for the reasons set forth in the Petition for Certiorari, Petitioner respectfully requests this Honorable Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CRIMINAL ACTION NO.
87 CV 80886

UNITED STATES OF AMERICA,
Plaintiff,

v.

ODEH JOSEPH SALEH,
Defendant.

JURY TRIAL – VOLUME 8

PROCEEDINGS HAD in the above-entitled matter before the Honorable *ANNA DIGGS TAYLOR*, United States District Judge of the Eastern District of Michigan, Southern Division, at 737 U.S. Courthouse and Federal Building, 231 Lafayette Boulevard West, Detroit, Michigan, on Thursday, January 12, 1989.

APPEARANCES:

DONALD A. SCHEER, ESQ., Assistant U.S. Attorney,
On behalf of Plaintiff.

RICHARD M. LUSTIG, ESQ.,
On behalf of Defendant.

* * *

[188] indictment at the back back of all your instructions?

LAW CLERK: Yes, I have it here.

THE COURT: Okay. And the form.

Any objections, counsel, to—

MR. LUSTIG: Yes, Your Honor. Only one: 57—page 57.

THE COURT: Yes.

MR. LUSTIG: Your Honor, you gave the joint possession instruction as to drugs only. I don't think the instruction as given in 57 is fair. It's isolated in the way it's pled.

You gave the instruction regarding joint possession—

THE COURT: Wait a moment. You mean about ownership?

MR. LUSTIG: Yes, Your Honor.

THE COURT: Go ahead.

MR. LUSTIG: I would ask the Court to add to that charge the following language: "However, you must find that the prosecution met its burden of proof, that is, proof beyond a reasonable doubt, that the defendant knew about the presence of the gun and, further, that he intended to exercise control over the gun."

I believe that the language as it sits in the charge now is isolated in view of the fact that the— [189] nothing else concerning the elements of that should be given other than the interstate aspect of it concerning that offense.

Other than that, I believe the jury charge is fair.

MR. SCHEER: I disagree with counsel. I believe that the instruction on page 57 pertains to ownerhip and its significance in this case.

Ownership is not a defense, nor is ownership relevant to consideration of the defense, and any language relating to possession, be it joint or sole or constructive or actual, has no place in that particular instruction.

There are 2 possession instructions in the case. One of them is at page 60, following closely after the instruction that is objected to. I think that the possession instruction at page 60 is a correct statement of the law and that the jury is properly instructed as to that element.

MR. LUSTIG: There is no instriction as to possession. It's like it's—in drug cases, if you don't give an instruction as to possession, it's plain error. I submit to the Court the way that instruction is given, it's isolated, and it would be plain error in view of the fact that there's no specific instruction as to possession on the gun possession.